Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–110–03 OF 2019
ZABARIAH YUSOF, RHODZARIAH BUJANG AND LAU BEE LAN JJCA
21 MAY 2019

Criminal Procedure — Appeal — Decision of trial judge — Accused sought order that public prosecutor produce copy of letter appointing private lawyer as his senior deputy ('SDPP') to prosecute accused on various criminal charges — Accused also sought order disqualifying private lawyer from continuing to act as SDPP in his cases — Whether High Court's decision dismissing accused's application was non-appealable pursuant to s 50(1) read with s 3 of the Courts of Judicature Act 1964 as decision did not finally dispose of accused's rights — Whether decision was made 'in the course of trial' although no witnesses had yet been called — Whether under s 178(1) of the Criminal Procedure Code trial commenced when charge was read to accused and plea was taken — Whether accused's appeal had to be struck out for being incompetent

Criminal Procedure — Prosecution — Conduct of — Public prosecutor ('PP') appointed private lawyer ('GSR') under s 376(3) of the Criminal Procedure Code to conduct prosecution of accused on various charges — Whether appointment of GSR was valid and legal — Whether court could not order PP to produce to defence letter appointing GSR as s 376(3) did not require the appointment to be made in writing — Whether letter was also classified 'SECRET' and could not be disclosed without flouting Official Secrets Act 1972 — Whether court also could not order production of letter on ground of legitimate expectation as that doctrine did not apply to criminal proceedings — Whether court could not disqualify GSR from continuing to act as PP's deputy as accused's allegations that GSR was biased against him and would deny him of fair trial were baseless

The appellant, a former prime minister of Malaysia, had applied to the High Court to disqualify a lawyer in private practice ('GSR') from taking charge of the prosecution against him on several criminal charges. The application also sought to order the respondent ('the PP') to produce a copy of his letter ('the LOA') appointing GSR as a senior deputy public prosecutor ('SDPP') under s 376(3) of the Criminal Procedure Code ('the CPC') in respect of the cases against the appellant. The instant appeal was against the High Court's dismissal of the appellant's application. The High Court held that: (a) proof of GSR's appointment as SDPP was not in issue since the appointment was not only announced by the PP in a media release but also because the appellant's counsel

had already viewed the LOA himself; (b) s 376(3) of the CPC did not require the appointment to be made in writing and it followed that there was no provision for such a letter to be produced on demand; (c) the appointment did not require to be *gazetted*; (d) the appellant had not given his reason for requiring the LOA to be produced apart from saying that it was to examine the scope of GSR's appointment and that non-production of the LOA might impact upon the locus standi of GSR and cause the trial to become a nullity; (e) production of the LOA could not be ordered based on the doctrine of legitimate expectation as the doctrine did not apply to criminal proceedings; (f) as the LOA was marked as 'RAHSIA', its production could not be ordered without breaching the law; (g) there was no basis for the appellant to contend that GSR was involved in the investigations in the cases he was to prosecute as the investigations were carried out by the relevant law enforcement agencies and GSR had no part in it; and (h) the appellant failed to show any cogent evidence that GSR was biased against him such that there was a real risk the appellant would be denied of a fair trial. At the commencement of the instant appeal hearing, the PP raised the preliminary objection that the appeal should be struck out in limine because the decision of the High Court was non-appealable under s 50, read with s 3, of the Courts of Judicature Act 1964 ('the CJA') as it did not finally dispose of the appellant's rights.

Held, allowing the preliminary objection, striking out the appeal and affirming the High Court's decision:

(1) The decision of the High Court on the dismissal of the application was not appealable by virtue of s 50(1) read with s 3 of the CJA and for that reason alone the appeal had to be struck out. Since pursuant to s 178(1) of the CPC and case law, a trial commenced when the charge was read to the accused and the plea was taken (which were already done in this case), the High Court's decision on the application was made during 'the course of the trial' and it did not finally dispose of the appellant's rights. The decision had nothing to do with the charges against the appellant, nor was it shown how the decision affected the appellant's right to a fair trial (see paras 11 & 16–17).

(2) The High Court judge did not err in finding that the PP was not obliged in law to produce the LOA to the appellant. The existence of the LOA was not disputed as the appellant's counsel had already viewed it. The PP had also appeared in the proceedings and informed that GSR had been appointed by him pursuant to s 376(3) of the CPC. There was thus no issue that GSR had the authority to appear in Court and conduct the proceedings and no issue that his appointment was valid and legal. GSR's appointment was not required to be *gazetted* and since s 376(3) of the CPC did not require the appointment to be made in writing, there was no provision for a LOA to be produced upon demand. The section was clear and unambiguous. The court was therefore in no position to require

A the PP to produce the LOA. Furthermore, the LOA was marked as 'RAHSIA' and its disclosure could not be made without flouting the provisions of the Official Secrets Act 1972. The court was unable to appreciate how the mere non-production of the LOA would, as alleged by the appellant, violate his constitutional right to a fair trial under arts 5 B and 8 of the Federal Constitution given that the trial would be under the strict supervision of the trial judge and that the appellant had a team of capable and experienced counsel to defend him (see paras 43, 45–49, 52, 54–55 & 103–107).

C (3) The High Court rightly held that the concept of legitimate expectation only applied in judicial review proceedings involving public law and not in criminal proceedings. Even assuming the doctrine applied, it was not shown that the appellant's legitimate expectation outweighed the legitimate expectation of the public interest (see paras 51 & 53).

D (4) Apart from the appellant's bare assertion, no material was placed before the court to show that GSR was involved in the investigations of the cases that he was to prosecute. GSR had also denied by way of affidavit, any involvement in the investigating process and had stated that he had never at any time exceeded his role as a prosecutor (see paras 74 & 77).

E (5) There was nothing before the court to show a real danger of bias by GSR if he continued to act as prosecutor in the cases against the appellant. The trial judge did not err in finding that the appellant's apprehension of overzealous prosecution by GSR was based on mere speculation and not F actual prosecutorial misconduct. What was alleged by the appellant was not based on specific facts but mere general suspicions. To disqualify a prosecutor, the appellant had to show cogent and definite evidence of bias and not mere bare allegations (see paras 100–102).

G **[Bahasa Malaysia summary**

Perayu, mantan perdana menteri Malaysia, telah memohon kepada Mahkamah Tinggi untuk melucutkan kelayakan seorang peguam dalam amalan persendirian ('GSR') daripada mengendalikan pendakwaan terhadapnya atas beberapa tuduhan jenayah. Permohonan itu juga H memerintahkan supaya responden ('PP') mengemukakan salinan suratnya ('LOA') yang melantik GSR sebagai timbalan pendakwa raya ('TPR') di bawah s 376(3) Kanun Tatacara Jenayah ('KTJ') berhubung kes-kes terhadap perayu. Rayuan ini adalah terhadap penolakan Mahkamah Tinggi terhadap permohonan perayu. Mahkamah Tinggi berpendapat bahawa: (a) bukti I pelantikan GSR sebagai TRP bukan suatu isu kerana pelantikan itu bukan sahaja diumumkan oleh PP dalam siaran media tetapi juga kerana peguam perayu telah melihat LOA itu sendiri; (b) s 376(3) KTJ tidak menghendaki pelantikan itu dibuat secara bertulis dan ia diikuti bahawa tidak ada peruntukan untuk surat itu dikemukakan apabila diminta; (c) pelantikan itu

tidak perlu *diwartakan*; (d) perayu tidak memberikan alasannya untuk menghendaki LOA itu dikemukakan selain mengatakan bahawa ia adalah untuk memeriksa skop pelantikan GSR dan bahawa jika tidak mengemukakan LOA itu mungkin memberi kesan kepada locus standi GSR dan menyebabkan perbicaraan menjadi terbatal; (e) pengemukaan LOA itu tidak boleh diperintahkan berdasarkan doktrin jangkaan yang sah kerana doktrin itu tidak terpakai untuk prosiding jenayah; (f) oleh kerana LOA itu ditandakan sebagai 'RAHSIA', ia tidak boleh diperintahkan untuk dikemukakan tanpa melanggar undang-undang; (g) tidak ada asas bagi perayu untuk menyatakan bahawa GSR terlibat dalam siasatan dalam kes-kes yang dia akan mendakwa kerana siasatan dijalankan oleh agensi penguatkuasa yang berkaitan dan GSR tidak terlibat dengannya; dan (h) perayu gagal memperlihatkan apa-apa bukti yang jelas bahawa GSR adalah berat sebelah terhadapnya sedemikian rupa sehingga terdapat risiko sebenar perayu akan dinafikan perbicaraan yang adil. Pada permulaan perbicaraan rayuan ini, PP menimbulkan bantahan awal bahawa rayuan itu perlu dibatalkan kerana keputusan Mahkamah Tinggi tidak boleh dirayu di bawah s 50, dibaca dengan s 3, Akta Mahkamah Kehakiman 1964 ('AMK') kerana ia tidak melupuskan hak perayu.

Diputuskan, membenarkan bantahan awal, membatalkan rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Keputusan Mahkamah Tinggi mengenai penolakan permohonan itu tidak boleh dirayu berdasarkan s 50(1) dibaca bersama s 3 KTJ dan untuk alasan itu sahaja rayuan itu perlu dibatalkan. Oleh kerana menurut s 178(1) KTJ dan undang-undang kes, suatu perbicaraan bermula apabila pertuduhan dibacakan kepada tertuduh dan pengakuan telah diambil (yang telahpun dilakukan dalam kes ini), keputusan Mahkamah Tinggi mengenai permohonan itu telah dibuat sepanjang 'the course of the trial' dan tidak melupuskan hak perayu. Keputusan itu tiada kaitan dengan pertuduhan-pertuduhan terhadap perayu, dan tidak ditunjukkan bagaimana keputusan itu menjejaskan hak perayu untuk mendapat perbicaraan yang adil (lihat perenggan 11 & 16–17).

(2) Hakim Mahkamah Tinggi tidak terkhilaf dalam menemukan bahwa PP tidak diwajibkan dalam undang-undang untuk menghasilkan LOA kepada perayu. Kewujudan LOA tidak dipertikaikan kerana peguam perayu telahpun melihatnya. PP juga telah hadir dalam prosiding itu dan memaklumkan bahawa GSR telah dilantik olehnya menurut s 376(3) KTJ. Oleh itu tiada isu bahawa GSR mempunyai kuasa untuk hadir di mahkamah dan melaksanakan prosiding dan tiada isu bahawa pelantikannya sah menurut undang-undang dan adalah sah. Pelantikan GSR tidak perlu *diwartakan* dan oleh kerana s 376(3) KTJ tidak memerlukan pelantikan dibuat secara bertulis, tiada peruntukan untuk LOA dikemukakan apabila diminta. Bahagian ini jelas dan tidak taksa. Oleh itu, mahkamah bukan dalam kedudukan untuk menghendaki PP

mengemukakan LOA itu. Tambahan pula, LOA itu telah ditandakan sebagai 'RAHSIA' dan penzahirannya tidak boleh dibuat tanpa melanggar undang-undang Akta Rahsia Rasmi 1972. Mahkamah tidak dapat menghargai bagaimana LOA yang semata-mata tidak dikemukakan, seperti yang didakwa oleh perayu, melanggar hak perlembagaannya untuk perbicaraan yang adil di bawah perkara 5 dan 8 Perlembagaan Persekutuan memandangkan perbicaraan itu berada di bawah pengawasan ketat hakim perbicaraan dan perayu memiliki pasukan peguam yang berkemampuan dan berpengalaman untuk membelanya (lihat perenggan 43, 45–49, 52, 54–55 & 103–107).

(3) Mahkamah Tinggi dengan betul berpendapat bahawa konsep jangkaan yang sah hanya terpakai dalam prosiding kajian semula kehakiman yang melibatkan undang-undang awam dan bukan dalam prosiding jenayah. Bahkan dengan mengandaikan doktrin tersebut adalah terpakai, ia tidak ditunjukkan bahawa jangkaan yang sah oleh perayu melebihi jangkaan yang sah kepentingan umum (lihat perenggan 51 & 53).

(4) Selain daripada pernyataan kosong perayu, tiada bahan dikemukakan di hadapan mahkamah untuk menunjukkan bahawa GSR terlibat dalam penyiasatan kes-kes yang dia akan mendakwa. GSR juga dinafikan melalui afidavit, tentang apa-apa penglibatan dalam proses siasatan dan menyatakan bahawa dia tidak pernah melampaui peranannya sebagai pendakwa raya (lihat perenggan 74 & 77).

(5) Tidak ada apa-apa di hadapan mahkamah untuk menunjukkan bahaya sebenar bagi berat sebelah oleh GSR jika dia terus bertindak sebagai pendakwa raya dalam kes terhadap perayu. Hakim perbicaraan itu tidak terkhilaf kerana mendapati bahawa kebimbangan perayu terhadap pendakwaan yang keterlaluan oleh GSR adalah berdasarkan pada spekulasi semata-mata dan bukannya salah laku pendakwaan yang sebenar. Apa yang didakwa oleh perayu tidak berasaskan fakta tertentu tetapi semata-mata syak wasangka. Untuk melucutkan kelayakan seorang pendakwa raya, perayu sepatutnya menunjukkan keterangan jelas dan pasti tentang berat sebelah dan bukan dakwaan kosong semata-mata (lihat perenggan 101–102).]

Notes

For cases on conduct of prosecution, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3616–3625.

For cases on decision of trial judge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 680

Cases referred to

Accent Management Ltd v Commission of Inland Revenue [2013] NZCA 155; [2013] 3 NZLR 374, CA (refd)

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831, FC (refd)
Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 2 MLJ 137; [2008] 6 CLJ 1, FC (refd)
Black v Taylor [1993] 3 NZLR 403, CA (refd)
Christopher Ak Bandi @ Josny v Tumbung ak Nakis & Anor(Jamil bin Sindi, third party) [2016] 4 MLJ 100, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP [2014] 1 MLJ 317, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2014] MLJU 1876; [2014] 4 MLRA 420, CA (refd)
Dato' Seri Anwar Ibrahim v PP [2014] 3 MLJ 882, CA (refd)
Dato' Seri Anwar Ibrahim v PP [2017] 1 MLJ 273, FC (refd)
Dato' Seri Anwar bin Ibrahim v Pendakwa Raya [2014] MLJU 1876, FC (refd)
Datuk Haji Dzulkifli bin Datuk Abdul Hamid v PP [1981] 1 MLJ 112, FC (refd)
Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor [2015] 1 MLJ 847; [2014] MLRAU 1, FC (refd)
Food Corporation of India v Kamdhenu Cattle Feed Industries AIR 1993 SC 1601, SC (refd)
Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd [1995] VR 446, SC (refd)
Kallininicos v Hunt [2005] NSWSC 1181 (refd)
Karpal Singh a/l Ram Singh v PP [2012] 5 MLJ 293, FC (refd)
Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] MLJU 667; [2005] 3 CLJ 914, FC (refd)
Letchumanan a/l Suppiah v PP and another appeal [2009] 5 MLJ 597; [2009] 5 CLJ 652, FC (refd)
MG v R [2007] NSWCCA 57 (refd)
Maleb bin Su v PP [1984] 1 MLJ 311; [1984] 1 CLJ Rep 232, FC (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (folld)
PP v Datuk Haji Wasli bin Mohd Said [2015] 3 MLJ 35, CA (refd)
PP v Datuk Harun bin Hj Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Lew Koy [2001] 4 MLJ 655, HC (refd)
Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh [2009] 4 MLJ 293, CA (refd)
Rasahiman bin Rasul lwn Pendakwa Raya [2011] 4 MLJ 295; [2011] 6 CLJ 750, CA (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)
Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara [2000] 4 MLJ 167, CA (refd)

Legislation referred to

Constitution of India [IND] art 14
Courts of Judicature Act 1964 ss 3, 22, 50, 50(1)
Criminal Procedure Code ss 4, 51A, 51A(3), 178(1), 376(3), 377(a), (b), 379
Evidence Act 1950 ss 114(g), 126
Federal Constitution arts 5, 8, 121(1), 145, 145(2), (3)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5, 10(a), (b)
Legal Profession Act 1976 ss 94(2), 94(3)(k)
Legal Profession Publicity Rules 2001
Malaysian Anti-Corruption Commission Act 2009
Official Secrets Act 1972
Penal Code s 354
Securities Commission Malaysia Act 1993

Appeal from: Criminal Appeal No MTJ (1) 44–211–12 of 2018 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (Syahirah Hanapiah with him) (Shafee & Co) for the appellant.
Ahamd Akram Gharib (Deepa Nair a/p Thevaharan and Nadia Mohd Izhar with him) (Attorney General's Chambers) for the respondent.

Zabariah Yusof JCA:

[1] The appeal before us is against the decision of the learned High Court judge that dismissed the notice of motion by the appellant (the applicant in the court below) who sought to disqualify Dato' Seri Gopal Sri Ram ('GSR') from continuing to act as a prosecutor in the following criminal cases brought against the appellant:

(a) WA-45–7 of 2018 and WA-45–8 of 2018 ('the 1MDB case');

(b) WA-45–10 of 2018 ('the MOF case'); and

(c) WA-61R-26 of 2018 ('the PAC case').

[2] After hearing the oral submissions from parties and perusing through the written submissions and the appeal records, we found that there is no merits in the appeal. Accordingly, we unanimously dismissed the appeal and affirmed the decision of the learned High Court judge. We now give our reasons for so dismissing the appeal.

[3] Essentially the main reliefs sought by the appellant are, inter alia, for:

(a) an order that the respondent, within three days from the date of this order, produce a copy of the letter of appointment ('LOA') executed by the respondent in relation to the appointment of Dato' Seri Gopal Sri Ram (GSR) as a senior deputy public prosecutor ('SDPP') purportedly under s 376(3) of the Criminal Procedure Code; and

(b) an order that GSR be disqualified from continuing to act as a SPP and/or to appear on behalf of the public prosecutor in the 1MDB case, the MOF case and the PAC case.

PRELIMINARY OBJECTION BY THE RESPONDENT

[4] Before the commencement of the appeal herein, the respondent raised a preliminary objection, premised on the competency of the appeal by reason of s 50 of the Courts of Judicature Act 1964 ('the CJA') read with the definition section of the word 'decision' in s 3 of the same.

Section 50 of the CJA states:

> 50 Jurisdiction to hear and determine criminal appeals
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any *decision* made by the High Court —
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or reversionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

Section 3 of the CJA defined the word 'decision' as:

> 'decision' means judgment, sentence or order, but does not include any *ruling made in the course of a trial or hearing* of any cause or matter which *does not dispose of the rights of the parties.*

[5] The respondent referred us to the Federal Court case of *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597; [2009] 5 CLJ 652 and the Court of Appeal case of *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 in support of the preliminary objection.

[6] In *Letchumanan Suppiah* the Federal Court held that the order by the Court of Appeal in directing the accused to enter his defence and remitting it back to the High Court for the defence case to be heard, is not an appealable order. This was because the said order by the Court of Appeal does not constitute a finality to his rights to a three tiered appeal.

[7] Similarly in *Saad bin Abas & Anor* where the accused persons were acquitted by the magistrate court at the close of the prosecution's case on a

charge under s 354 of the Penal Code. On appeal to the High Court, the accused persons were ordered to enter defence on the said charge. The accused persons appealed against the order of the High Court and applied for leave to appeal to the Court of Appeal. This court ruled that the High Court at the stage of making the order against the accused persons to enter their defence, did not make a decision which disposed of the rights of the accused persons to their finality. Therefore the decision of the High Court was not appealable. This court further ruled at p 138 as follows:

> So, for the purpose of s 50(2), this Court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

[8] It was submitted by the respondent that the effect of the decision against the accused persons in both *Letchumanan Suppiah* and *Saad bin Abas* was far more serious than the effect of the decision of the learned High Court judge in the notice of motion of the appellant in the current case. The issue in both of the aforesaid cases was whether the order for the accused persons to enter their defence finally disposed of their rights. Therefore, what can be distilled from the aforesaid cases is that a ruling/order/decision would not be appealable if it does not dispose of the rights of parties.

[9] However those two cases focused only on the second limb of the definition of 'decision' in s 3 of the CJA. It is to be noted that the said section consists of two limbs, ie:

(a) the decision is made during the course of a trial or hearing of any cause or matter; and

(b) the decision does not dispose of the rights of the parties.

Both these limbs must be applied with equal force and given equal importance. *Letchumanan Suppiah* and *Saad bin Abas* did not address the first limb as it was never raised and never was an issue. This court in *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847; [2014] MLRAU 1 had referred to another decision of this court in *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495 which considered the question of a right to appeal against a ruling made in the course of a trial has emphasised the importance of both limbs to be satisfied for the definition section to bite. Azhar Mohamed JCA (as he then was) delivering the decision of the Court of Appeal quoted the following dicta of this court in *Syarikat Tingan Lumber* at p 5:

> What we feel, however, must be emphasised with equal force when scrutinizing s 3 of the CJA, as amended, is that, the said ruling must be made in the course of a trial or hearing. Much emphasis, we feel, is placed on the latter part of the sentence vis a vis ... and does not finally dispose of the rights of the parties', thus overlooking the fact that the ruling must be made in the course of the trial or hearing of any cause

or matter. Counsel, we found, appeared to be preoccupied with the determination of whether the ruling disposes the rights of parties, but paid scant regard to the fact as to at what juncture the said ruling was made.

Equal weight should be attached to the entire sentence of s 3 of the CJA, as amended, for what must be asked is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made in the course of a trial or hearing of any cause or matter. If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition 'decision' as provided in s 3 of the CJA, as amended, and is therefore appealable.

It is to be noted that the decision of this court in *Datuk Seri Tiong King Sing* was upheld by the Federal Court on 7 March 2016 as pointed out by a decision of this court in *Christopher Ak Bandi @ Josny v Tumbung ak Nakis & Anor(Jamil bin Sindi, third party)* [2016] 4 MLJ 100 at p 108 para 14.

[10] Mr Harvinderjeet Singh for the appellant did argue that the decision must 'not be a ruling made in the course of a trial or matter' and 'which does not finally dispose the rights of the parties to qualify under the section as decision not appealable'. In respect of the first limb the issue that arose from this phrase in the section is this: is the decision made by the High Court in dismissing the notice of motion made in the course of trial or matter? There is no doubt that in both of the cases of *Letchumanan Suppiah* and *Saad Abbas*, the decisions appealed against were made in the course of the trial or matter, as it was at the end of the prosecution's stage, meaning trial has commenced with witnesses already called. Compared to the case of the appellant herein, can the same be said that the decision by the learned High Court judge in dismissing the notice of motion be said to be made in the course of the trial or matter when witnesses have yet to be called? Can it be said that the present case has not started or begun?

[11] The issue then is, when does a trial begin? On this point the learned public prosecutor referred to s 178(1) of the CPC which provides that:

(1) When the Court is ready *to commence the trial,* the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried. (Emphasis added.)

A reading of s 178(1) of the CPC appears to provide that a trial commences when a charge is read to the accused person. The case on point is *Rasahiman bin Rasul lwn Pendakwa Raya* [2011] 4 MLJ 295; [2011] 6 CLJ 750 paras 14–15 where this court made a finding that the date when the trial first commenced was when the charge was read to the accused. The relevant paragraphs read:

A [14] Kami mendapati isu yang dibangkitkan ini ternyata tidak berlandaskan kepada fakta sebenar sebagaimana yang jelas tercatat dalam nota prosiding kes ini. Berdasarkan kepada 'nota keterangan' yang dibekalkan kepada mahkamah ini, kami mendapati *tarikh permulaan perbicaraan kes adalah pada 2 November 2004* ... Nota keterangan pada 2 November 2004 tersebut, setakat yang relevan, berbunyi seperti
B berikut:

TPR: Tuan Saiful Edris b. Zainuddin

OKT hadir

TPR mengemukakan izin dan rekuisisi dan pertuduhan.

C

Pohon baca pertuduhan.

Pertuduhan dibaca dan diterangkan kepada OKT.

OKT faham pertuduhan. OKT tidak mengaku

D kesalahan dan minta dibicarakan.

[15] Oleh itu, adalah jelas daripada ekstrak nota keterangan tersebut di atas bahawa hakim perbicaraan telah mematuhi peruntukan s 178(1) KTJ yang menghendaki *pertuduhan dibacakan dan diterangkan kepada tertuduh pada permulaan perbicaraan*. Tiada keperluan untuk membacakan dan menerangkan pertuduhan
E yang sama pada tarikh-tarikh perbicaraan yang selanjutnya. (Emphasis added.)

Therefore, a trial is said to have commenced when the charge is read to the accused and the plea is taken. Applying s 178(1) of the CPC and the case of *Rasahiman bin Rasul lwn Pendakwa Raya* to the current case, the decision by
F the learned High Court judge on the notice of motion is made during the course of the trial or matter as the charge had been read to the appellant and a plea had been taken.

[12] Next, the question that needs to be asked is whether, the High Court in
G making a decision in not ordering respondent here to produce GSR's letter of appointment as well as allowing GSR to continue to act as a prosecutor in cases involving the appellant, finally disposes of the appellant's rights.

[13] Counsel for the appellant submitted that, in the event the court were to
H find at the end of the whole trial that the appointment of GSR was invalid, the whole case would be a nullity. The learned public prosecutor candidly agreed that such would be the consequence in the event the case proceeds until completion and goes up for appeal where the Court of Appeal decides that the application for the disqualification of GSR ought to be allowed. Counsel for
I the appellant submitted further that, the minute there is a possibility of a retrial or the case being declared to be a nullity, it means that the decision is a finality and cannot be reversed.

[14] In this regard we refer to this court's decision in the case of *Public*

Prosecutor v Datuk Haji Wasli bin Mohd Said [2015] 3 MLJ 35 which is on point with the present case. There, the prosecution took out a notice of motion to disqualify/remove Tan Sri Muhammad Shafee ('TSMS') as counsel for the accused. The application to disqualify/remove TSMS was made after seven prosecution witnesses had testified and almost three years after TSMS had been representing the accused and making appearances in the Court of Appeal and the Federal Court. The application for the disqualification/removal of TSMS was premised on the alleged infringement of rr 3, 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 and the court's inherent jurisdiction. The main concern by the prosecution (who was the applicant there) was on the issue of the perception of society in the appointment of TSMS as he 'had appeared as counsel for Tan Sri Kasitah Gadam in an inter-related criminal case, wherein Datuk Wasli bin Mohd Said was a witness for the prosecution and was cross-examined at length by TSMS'. In the criminal action against Datuk Wasli bin Mohd Said, Tan Sri Kasitah Gadam 'would be a witness for the prosecution and would invariably be subjected to cross-examination by counsel, TSMS'. The High Court in that case dismissed the application by the prosecution for the removal of TSMS. Aggrieved, the prosecution appealed to the Court of Appeal against the dismissal on their notice of motion. At the Court of Appeal, the prosecution took the reverse stand as in the current case, ie the prosecution there argued that the decision made by the High Court in dismissing the prosecution's notice of motion to disqualify/remove TSMS was appealable. It was held by the Court of Appeal at p 36 that:

> [1] The appeal filed by the prosecution was an incompetent appeal which was precluded by law.
>
> [2] *The decision of the High Court judge in dismissing the prosecution's application to remove Tan Sri Muhammad Shafee was a decision made in the course of the trial which did not finally dispose of the rights of the parties*. The rights of the parties relate to the charges preferred against the respondent ie whether the respondent will be found guilty or innocent of the charges. The rights do not relate to the notice of motion filed by the prosecution.

[15] This court in *Datuk Hj Wasli bin Mohd Said* referred to a Federal Court decision in *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293 which held that:

> [19] In order for a decision to be final, the defence must first be heard, and after a maximum evaluation of the total evidence a decision eventually be made. It is at that conclusive stage, when the fate of the appellant is known, the right of appeal is triggered ...
>
> [21] A dissatisfied party is never deprived of his right to appeal after the conclusion of a trial, in the event he feels aggrieved with the ruling made in the course of the trial, as that supposed error could be raised in the appeal proper. Again Arifin Zakaria CJ in *Dato' Seri Anwar Ibrahim v Public Prosecutor* opined:

A The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

B **[16]** Coming back to the facts of the present case, the effect of the decision of the High Court in dismissing the notice of motion would mean that the appellant would not have the right to have sight of GSR's LOA and that GSR would continue to act as SPP in the cases involving the appellant. Premised on these two above mentioned cases, the decision of the learned High Court judge C does not dispose of the appellant's rights to its finality. The decision in dismissing the application by the appellant to disqualify GSR has got nothing to do with the charge against the appellant. In addition, it has not been shown how does that affect the appellant's rights to have a fair trial.

D **[17]** In view of the aforesaid, we unanimously found that the decision of the learned High Court judge is not appealable by virtue of s 50(1) read with s 3 of the CJA. We therefore allowed the preliminary objection by the respondent. Accordingly, the appeal by the appellant is struck out based on this reason alone.

E

[18] Assuming that we are wrong in our determination of the preliminary objection, for completeness, we proceeded to consider the merits of the appeal by the appellant on the decision of the learned High Court judge in dismissing the notice of motion.

F

THE MERITS OF THE APPEAL

[19] At the outset, we take note of the Federal Court's decision in Criminal Appeal No (L)-71–03 of 2019 ie the decision in relation to the application by G the appellant in another case for the production of the letter of appointment of Dato' Sulaiman Abdullah as DPP. In this regard the appellant relied on para 12 of the said Federal Court's decision to support the view that a legitimate expectation arises against the LOA where a specific challenge is made against H the validity of the said appointment. We note that in the context of our case, the said Federal Court's decision is not applicable as the facts are different. Firstly, Dato' Sulaiman Abdullah's appointment was made under s 379 of the CPC (where the appointment has to be 'with the permission in writing of the public prosecutor') and secondly, there was no challenge as to the validity of the I said appointment. That was the finding of this court and also from the judgment of the Federal Court in Criminal Appeal No (L)-71–03 of 2019 wherein it is stated as follows:

> 8. ... the basic premise that the Respondent's motion in substance is not to challenge the validity of the appointment of Datuk Hj Sulaiman but only for the production

> of the letter of appointment. That was the view of the High Court and the Court of Appeal. There is no challenge by the respondent of this finding by way of cross appeal ...
>
> 12. In short ... unless there is a challenge to the validity to the appointment of the counsel, there exists no duty on the appointing authority or private entity to produce the letter of appointment ...

[20] Compare it to the present case, the appointment of GSR was under s 376(3) of the CPC (no requirement that the appointment to be in writing) and that the appellant had mounted a challenge on the appointment of GSR in a judicial review proceedings in another court. In those proceedings the appellant seeks an order of certiorari quashing the public prosecutor's appointment of GSR. We find this argument is inconsistent with the appellant's own submission that '[T]his application (this notice of motion) amounts to sufficient challenge on the appointment of GSR's letter of appointment'.

The appellant urged this court to take judicial notice of the aforesaid judicial review proceedings during oral submission.

We agreed with the respondent that this issue must be dealt with in the proper forum; otherwise the respondent will be denied of its rebuttal.

[21] The appellant is not disputing the existence of the letter of appointment of GSR, as Mr Harvinderjeet Singh, counsel for the applicant has had sight of the same on 13 September 2018.

THE FINDINGS OF THE HIGH COURT

On the first issue: Whether the LOA of GSR ought to be produced

[22] The appointment of GSR as SPP by the public prosecutor was made known through a media release by the public prosecutor dated 31 August 2018.

The relevant part of the media release is reproduced herein below:

> 5. ... I am pleased to announce the appointment of Datuk Seri Gopal Sri Ram as Senior Deputy Public Prosecutor pursuant to Section 376(3) of the CPC.

[23] The learned High Court judge held that the media release is ex facie proof of the appointment of GSR as SDPP.

[24] When criminal proceedings were commenced against the appellant's counsel (Tan Sri Muhammad Shafee) on 13 September 2018 a copy of GSR's

A instrument of appointment was requested by counsel, and the original letter of appointment was shown to the appellant's counsel by another DPP. This fact was also mentioned in the letter of the respondent dated 1 October 2018.

B **[25]** Counsel for the appellant had sight of the LOA and thus the appellant had implicit knowledge of the LOA and its existence.

C **[26]** On the issue which the appellant raised that the LOA must now be produced because there is a challenge, there is no provision in s 376(3) of the CPC that the appointment must be in writing and that it must be produced on demand.

D **[27]** Neither is there a requirement for the appointment to be *gazetted* and by insisting to do so would mean that this court is reading something into the provision of the law, which is not there.

E **[28]** The learned High Court judge referred to *Public Prosecutor v Lew Koy* [2001] 4 MLJ 655 where it was held that if there is any doubt to the existence of the authority of the prosecutor, the duty is only to supply written authority by the public prosecutor for the court's inspection alone. However, in the present case, the appointing authority has also confirmed the appointment of GSR before the High Court, and therefore takes cognisance of it.

F **[29]** The reason of requiring such production of LOA has also not been disclosed in the notice of motion other than to state that the non-production may impact upon the locus standi of GSR and may result in the trial being held eventually to be a nullity.

G **[30]** On the legitimate expectation point, counsel for the appellant did not produce any authority to support the contention that the concept of legitimate expectation applies in criminal proceedings.

H **[31]** The appellant's counsel also submitted that the reason for requesting the production of LOA was to examine the scope of the appointment. The LOA is a confidential document and the counsel for the appellant also admitted that the document that he sighted was marked as 'RAHSIA'. The learned High Court judge said by way of analogy to the solicitors and clients' privilege with regard to private practitioners is contained in s 126 of the I Evidence Act 1950, and the prosecution in pursuance of their duty cannot be placed in a worse off position than those in private practice.

On the second issue: Whether GSR ought to be disqualified from continuing to act as SPP and to appear on behalf of the public prosecutor

[32] The learned High Court judge found that the court is vested with the inherent jurisdiction to regulate its proceedings and this includes disqualifying a party appearing for good reason is therefore not in dispute.

[33] The applicant raised two points on GSR disqualification, firstly GSR was involved in the investigation in the cases and hence cannot prosecute those cases. Secondly, GSR has already taken a position on the culpability of the appellant.

[34] The appellant submits that the media release by the attorney general's office and the interview given by the attorney general to *The Edge* indicated that GSR was also involved in the investigation of the 1MDB case. However, the learned High Court judge dismissed the contentions that GSR was involved in the investigation as those are the duties of the police, MACC and the Securities Commission and the role of the public prosecutor and the public prosecutor only arises after investigation was completed on whether to initiate charges.

[35] The learned High Court judge found that it is inconceivable that GSR was involved in the investigation of the cases and GSR had also denied this in the affidavits filed.

[36] On the issue that GSR had taken a position of culpability of the appellant because he had acted as defence counsel in *Anwar Ibrahim*'s case and acted for Zaid Ibrahim in a notice of motion to the Federal Court relating to a judicial review on the attorney general's decision not to prosecute the applicant, the court also dismissed this contention as the arguments canvassed by the appellant in reference to *Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] 1 VR 446 ignores two points:

(a) firstly, the cab-crank rule whereby advocates are bound to accept a brief in any court in which they practice at a proper professional fee unless special circumstances justify a recusal. The fact that GSR acted in the said cases does not in any way mean that it had affected his professional ability to conduct those cases in an objective and impartial manner; and

(b) secondly, is the duty, obligation and ability of trial court to control its own proceedings, and the ultimate decision maker is the judge.

[37] The appellant raised concerns of overzealous prosecution by GSR given his biasness and partiality and the fact that GSR made certain statements as if he has already taken the position of the appellant's culpability, ie GSR objected to the bail application on 20 September 2018 when the 1MDB case commenced and made submissions to show the appellant was already guilty. In support the appellant referred to the case of *MG v R* [2007] NSWCCA 57.

However the court distinguished the said case in that, the prosecutor therein, made public statements outside court, whereas in the current case the statement was made during GSR's course of duty as SPP during court proceedings.

[38] The overzealous prosecution argument is based on mere speculation as opposed to actual prosecutorial misconduct.

[39] There is no evidence of biasness by GSR that would lead a reasonable person to conclude that the appellant would not be accorded a fair trial.

[40] The allegation of perjury levelled against GSR are also bare allegations.

[41] Based on the aforesaid, the application and the motion of the appellant was subsequently dismissed by the learned High Court judge.

[42] The appellant applied for stay of trial dates fixed because they intended to file an appeal against the decision of the learned High Court judge to the Court of Appeal. The court refused the stay. On the issue of stay, the appellant's counsel indicated to this court that they are no longer proceeding with the appeal on the dismissal of the application for stay by the learned High Court judge and accordingly we struck out the said appeal.

OUR DECISION

On the first issue: Whether the LOA of GSR ought to be produced

[43] The learned High Court judge initially thought that the challenge was in respect to the existence of the LOA, but as events transpired, Mr Havinderjeet Singh, counsel for the appellant took the stand that the appellant was not disputing the existence of the LOA as he had sight of the same in the course of the proceedings when he was shown by one of the DPP.

[44] The appellant argued that there is a legal duty for the respondent to supply the LOA as can be seen from:

(a) s 377(a) of the CPC which outlines that every criminal prosecution may be conducted by a Senior DPP, a public prosecutor or a public prosecutor himself;

(b) s 376(3) of the CPC;

(c) GSR never produced any document reflecting his appointment or authorisation to act as a public prosecutor in the appellant's case;

(d) GSR has to date remained a practicing Advocate and Solicitor of the

High Court of Malaya under the Legal Profession Act 1976. The Court of Appeal in *Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara* [2000] 4 MLJ 167 has declared that advocates and solicitors under the Legal Profession Act 1976 are full time practitioners;

(e) GSR's appointment has not been gazetted;

(f) there is nothing produced to establish that GSR is an authorised person to have conduct of the prosecution in the appellant's case;

(g) in light of the challenge, the requirement for the instrument of authority to be shown to court is a prerequisite to the court to take cognisance (*Public Prosecutor v Lew Koy* [2001] 4 MLJ 655) where a challenge was made as to the validity of an appointment;

(h) the refusal of the respondent affects the plaintiff's right to a fair trial under art 5 of the Federal Constitution which by extension must include a right to only be prosecuted by properly appointed persons;

(i) moreover, given prior precedents on the matter, the refusal to produce the LOA is procedurally irregular. The refusal was interpreted as a vindictive and politically motivated stance taken by the respondent in light of the appellant's personality;

(j) there is a legitimate expectation of the appellant as an accused person to ensure that the prosecutor is a person duly appointed and be cognised by the court. The refusal to produce the LOA smacks of 'unfairness' given the prior practice on the same; and

(k) an issue which arises from the non-production of the LOA is that GSR is not clothed with the requisite locus standi with which to appear on behalf of the public prosecutor, who derives his rights from art 145(2) of the Federal Constitution and which rights subsequently resulted in s 376(3) of the CPC.

[45] We noted that the fact of appointment of GSR under s 376(3) of the CPC is never in doubt, as counsel had sight of the same.

[46] Hence we do not see the basis of the application for the production of the said LOA. Section 376(3) of the CPC does not require that the appointment to be made in writing. Thus, in the absence of the requirement of the appointment to be made in writing, it is a matter of course that the section does not provide for the LOA to be produced upon demand. It is not for the courts to read and impose procedural requirements into the provisions to rule a non-compliance. This is reading something into the provision which is not there in the first place. The section is clear and unambiguous. The Federal Court case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914 has stated that:

> ... it is not for the courts to create procedural requirements because it is not the function of the Courts to make law or rules. If there is no such procedural requirements then there cannot be non-compliance thereof. Only if there is that, there can be non-compliance thereof and only then the courts should consider whether, on the facts, there has been non-compliance.

[47] The central issue appears to be whether the appointment of GSR as SPP was based on law. Any appointment by the public prosecutor under s 376(3) of the CPC is not contingent upon such appointment being *gazetted* in the federal *gazette*. Therefore, it cannot be said that without the *gazette* the appointment of GSR is a nullity, void and of no effect. Counsel for the appellant referred to the case of *Public Prosecutor v Lew Koy* [2001] 4 MLJ 655, where the challenge was on the validity of an appointment under s 377(b) of the CPC and that the prosecuting authority *not having the authority in writing* to appear in court and having the conduct of the proceedings. In that case it was held that the prosecuting authority is only required to show to the court such written authority and it need not be tendered in court. However, the challenge there was different, ie on the purported lack of authority in writing on the part of the public prosecutor, which is not the case here. For convenience, we reproduce s 377(b) of the CPC below which provides:

> Every criminal prosecution before any court and every inquiry before a Magistrate shall ... be conducted —
>
> (a) ...;
>
> (b) subject to the control and direction of the Public Prosecutor, by the following persons who are *authorized in writing* by the Public Prosecutor:
>
> (1) an advocate;
>
> (2) a police officer not below the rank of inspector;
>
> (3) an officer of any Government department;
>
> (4) an officer of any local authority;
>
> (5) an officer of any statutory authority or body; or
>
> (6) any person employed or retained by any local authority or any statutory authority or body;

In our case, there is no dispute that there was a LOA appointing GSR under s 376(3) of the CPC. The public prosecutor had appeared in the proceedings and informed that GSR was appointed by him pursuant to s 376(3).

[48] In addition, the principle distilled from *Public Prosecutor v Lew Koy* is that where a challenge is made that the counsel did not have the authority in writing appears in court and conduct the proceedings, the prosecution officer need only show to the court that he has been issued with the written authority

by the public prosecutor. It need not be provided to the applicant/defence and neither must it be tendered as an exhibit in court.

Therefore, there is no issue that GSR has the authority to appear in court and conduct the proceedings. As s 376(3) does not require the production of the LOA, we are in no position to impose such requirement on the respondent.

[49] In addition, there is nothing in s 376(3) of the CPC that limits the power of the public prosecutor to appoint DPPs only amongst the judicial and legal service officers. The public prosecutor has a discretion to appoint fit and proper persons to do the job. In *Dato' Seri Anwar bin Ibrahim v Pendakwa Raya* [2014] MLJU 1876; [2014] 4 MLRA 420 at p 421, it was held by this court as follows:

> (3) The prosecutorial discretion to regulate the conduct of prosecution is the constitutional prerogative of the public prosecutor. The appointment of Shafee was at the sole discretion of the public prosecutor and no other body including the Bar Council could usurp that prerogative vested in the public prosecutor.

Therefore there is no issue that the appointment of GSR is valid and legal.

[50] The learned High Court judge found that it has not been manifest in the notice of motion of the purpose for the production of the LOA other than the non-production may impact upon the locus standi of GSR and may result in the trial being held to be a nullity. This, we found to be in direct contradiction with the earlier stand taken by the appellant as there is no challenge to the justiciability of the attorney general appointing GSR here. If the appointment is valid, then what constitutes the basis of such a challenge. Firstly, the challenge was on the very existence of the LOA. That has since passed. Subsequently, the reason expressed is that the appellant has a legitimate expectation:

(a) to have the LOA shown to the appellant (this no longer hold necessary as the LOA had indeed been shown); and

(b) to ensure that the persons prosecuting must be properly and duly appointed and the same must be cognised in court. The refusal to produce breeds 'unfairness' given the prior precedence of producing the same.

[51] We are in agreement with the learned High Court judge that the concept of legitimate expectation is only applicable in judicial review proceedings and one which involved public law. There was no authority on point submitted by the appellant in support of the concept of legitimate expectation to apply to criminal proceedings. Counsel for the appellant referred to the case of *Food Corporation of India v Kamdhenu Cattle Feed*

Industries AIR 1993 SC 1601 where the Supreme Court of India had this to say:

> There is no unfettered discretion in public law. A public authority possesses powers only to use then for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is necessary to consider and give due weight to the reasonable or legitimate expectation of the persons likely to be affected by the decision or else of power apart from affecting the bona fides of the decision in a given case.

[52] Applying the principle as can be discerned from the case in question, we failed to see how the appointment of GSR under s 376(3) of the CPC will result in the appellant not being accorded a fair trial. Even in *Food Corporation of India v Kamdhenu Cattle Feed Industries* it involved a civil suit, where the appellant-corporation invited tenders for sale of stocks of damaged food grains. The respondent's bid was the highest. However the appellant was not satisfied about the adequacy of the amount offered even in the highest tender, it invited all tenders to participate in the negotiations, instead of accepting the highest tender. During the course of the negotiations, the appellant disposed of the stocks of damaged food grains, rejecting the highest tenders. The respondent, whose tender was the highest, challenged the decision of the appellant by filing a writ petition before the High Court. The contention is that the decision of the appellant was arbitrary and hence in violation of art 14 of the Constitution of India. The High Court accepted the contention and the appellant-corporation appealed to the Supreme Court against the decision. On appeal it was held by the Supreme Court that:

> ... The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.
>
> [12] *The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary,* and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether *the expectation of the claimant is reasonable or legitimate* in the context is a question of fact in each case. Whenever the question arises, it *is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant*. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny ...

[53] We failed to see how is that case applicable to our case, firstly, the case is a civil suit where the basis of the suit was the alleged arbitrary decision by the appellant in rejecting a bid in a tender exercise which is the highest. The Supreme Court in the same case held that:

> 22 ... the respondent's highest tender was superseded only by a significantly higher bid made during the negotiations with all tenderers giving them equal opportunity to compete by revising their bids. The fact that it was significantly higher bid obtained by adopting the right course is sufficient to demonstrate that the action of the appellant satisfied the requirement of non-arbitrariness, and it was taken for the cogent reason of inadequacy of the price offered in the highest tender, which reason was evident to all tenderers invited to participate in the negotiations and to revise their bids. The Supreme Court found that the High Court was in error in taking a contrary view.

Secondly, in that case there was cogent reason to impose the legitimate expectation on the authority concerned in exercising its powers for the public good and thus imposes a duty to act fairly in accepting tender bids. How is that case applicable in the context of our case to say that the refusal to produce the LOA of the GSR would deprive the appellant from being treated in a fair manner or subjected to an arbitrary decision given that the ultimate decision lies with the trier of fact, ie the judge. In fact in the same case the Supreme Court held that the mere reasonable or legitimate expectation of a citizen in such a situation (the failure to accept the highest tender of the respondent initially), may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary. Further, any legitimate expectation is to be determined not according to the claimant's perception but in a larger public interest where there are other more important considerations which may outweigh the legitimate expectation of the claimant. Hence we do not think that the case of *Food Corporation of India v Kamdhenu Cattle Feed Industries* lends support to the appellant's contention of the legitimate expectation to have the LOA produced. Even applying the said case, there is nothing stated that the legitimate expectation of the appellant outweighs the legitimate expectation of the public interest.

[54] Another ground relied by the appellant for requesting the production of the LOA was to examine the scope of the appointment. Given that the legitimacy of the appointment is not in dispute and the AG himself has informed to the court that the appointment of GSR was pursuant to s 376(3) of the CPC, it is to be taken that GSR has the imprimatur of the AG to prosecute these cases. In addition the LOA has been marked as 'RAHSIA' and the law accorded protection to documents marked as such. The Federal Court in *Datuk Haji Dzulkifli bin Datuk Abdul Hamid v Public Prosecutor* [1981] 1 MLJ 112 held that:

> In our view, a document does not lose its status as a secret document merely because some unauthorised person or persons stole it, reproduced a copy and sent the copy by post to the appellant anonymously; nor does it lose its secrecy just because the letter happens to contain information which is already known to the public. If this argument is acceptable, it makes no sense of the secrecy of examination papers and even our draft judgments before they are released, as the information contained therein can openly be found elsewhere, in text books, periodicals, magazines and newspapers. In our view such a contention is totally unacceptable. If the originator or the owner of the document treats it and the information contained in it as a secret and clearly marks it and keeps it as such, we do not think that it is open to anyone to regard it as otherwise. The law must give protection to such document or information even though it contains information generally to the public.

To ask the respondent to produce the LOA is to ask the respondent to flout the provisions of the Official Secrets Act 1972 which prohibits the disclosure of a classified document and its disclosure can subject offenders to full penalty of the law.

[55] Therefore, we found that the learned High Court judge did not err in his finding that the respondent is not obliged in law to produce the LOA to the appellant.

On the second issue: Whether GSR ought to be disqualified from continuing to act as SPP and to appear on behalf of the public prosecutor

Inherent jurisdiction:

[56] The appellant sought to invoke the inherent jurisdiction of the court to disqualify a prosecutor notwithstanding the powers of the public prosecutor under art 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings. The appellant also submitted that this inherent power is also within the ambit of judicial power arising from the court's status as recognised in art 121(1) of the Federal Constitution.

[57] The respondent submitted that the court has no inherent jurisdiction apart from what is expressly provided in the CPC and the provisions of CPC are exhaustive. We disagreed with this argument as s 4 of the CPC states:

> Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court.

Section 22 of the CJA outlines the criminal jurisdiction of the High Court.

[58] From the aforesaid provisions, implicit in such powers is the jurisdiction of the High Court to regulate its proceedings. This means that it is part of the

inherent jurisdiction of the court in supervising and regulating the court proceedings before it, to disqualify a counsel and for that matter a prosecutor.

[59] Cases also had shown the presence of this inherent jurisdiction. The Supreme Court of Victoria in *Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] VR 446 had the occasion to elaborate on the presence of this inherent power when it held that:

> It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached. The issue here is not whether or not the rule was breached, or whether the solicitor worked for the government. Nor is it solely whether the patient lost confidence in the process. The issue is whether *the fair minded reasonably informed member of the public* would conclude that the proper administration of justice required the removal of the solicitor ... The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public ...
>
> *The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice* ...
>
> In my view it cannot be doubted that this court likewise has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, in an appropriate case, to prevent a member of counsel appearing for a particular party in order that justice should not only be done but manifestly and undoubtedly be seen to be done.

[60] The jurisdiction of the High Court to debar counsel was described by the Court of Appeal of New Zealand in *Black v Taylor* [1993] 3 NZLR 403 which held that any application to debar counsel involves a contest between two interests, ie:

(a) the right of a party to instruct counsel of choice; and

(b) the obligations of counsel as officers of the court and as independent counsel in litigation. Counsel's obligations in this area also include the professional and statutory obligations to uphold the rule of law and to act in accordance with their fiduciary duties.

It further held that the High Court has an inherent jurisdiction to control its own processes unless limited by statute. Pursuant to that inherent jurisdiction, the court has the power to determine the person that should be permitted to appear before it as an advocate and solicitor. In making this determination, the court is guided by established principles and rules and with what is required in the public interest for the efficient and effective administration of justice.

[61] Another aspect of the inherent jurisdiction is the control of a particular proceeding in the court. This is where the court is concern with the administration of justice to preserve confidence in the judicial system. The right to a fair hearing in the courts is not only an elementary but fundamental principle of justice. It is paramount that disputes be settled in a fair, open and even-handed way.

[62] Such order of debarring of counsel to appear in the conduct of proceedings requires a high threshold to be fulfilled before the order is warranted as illustrated in *Accent Management Ltd v Commission of Inland Revenue* [2013] NZCA 155; [2013] 3 NZLR 374 at para 32 where the Court of Appeal of New Zealand spoke of the need for the court to be alert to the misuse of debarring applications:

> The court has jurisdiction to debar counsel or solicitors from acting where that is necessary in order for justice to be done or to be seen to be done. Removal will usually be ordered where counsel will not be able to comply with his or duties to the Court: where there is a conflict of interest, or where there is a real risk that a client will not be represented with objectivity. *The threshold for removal is a high one, requiring something extraordinary.* The court should guard against allowing removal applications to be used as a tactical weapon to disadvantage the opposing party.

[63] Our local case on this point is the case of *Quah Poh Keat & Ors v Ranjit Singh a/l Taram Singh* [2009] 4 MLJ 293 where the Court of Appeal was similarly faced with a preliminary objection against the continued conduct of an advocate and solicitor due to a conflict of interest situation, namely the said advocate may equally occupy the witness box as he would the Bar table. The Court of Appeal held that:

> ... despite that statement we are of the view that a judge pursuant to his inherent jurisdiction has the power to disqualify him if all the statutory preconditions have been complied with ... Surely to avoid unnecessary problems prevention is better than cure in that, in such a scenario, an advocate and solicitor must be restrained at the outset ...

[64] Further, this court in *Asean Security Paper Mills Sdn Bhd lwn Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLJ 137; [2008] 6 CLJ 1 explained what is meant by 'inherent jurisdiction':

> [36] What then is the meaning of inherent jurisdiction? According to the *Concise Oxford Dictionary*, 'inherent' means 'existing in something, esp as a permanent or characteristic attribute'. In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

[65] The Federal Court in *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831, recognised the scope of the inherent powers of a criminal court to safeguard an accused person:

> Lord Morris of Borth-Y-Gest said:
>
> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.
>
> The power (which is inherent in a courts' jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.

[66] In *Public Prosecutor v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 at p 119, Abdoolcadeer J in his judgment said that:

> 'Conduct' in art 145(3) cannot but refer to the conduct of prosecutions in court, as indeed appears ipsiss verbis in s 377 of the CPC. And 'control and direction' in s 376 of the CPC is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.
>
> 'conduct' of criminal prosecutions and proceedings in art 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the public prosecutor abrogating to himself the legislative powers vested in Parliament under item 4 and in particular para (b) thereof in List 1 (Federal lLst) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of Article 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law — namely, the subordinate Courts Act 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.
>
> Pursuing its signification, 'to conduct' means 'to lead, guide, manage (*In re Bhupalli Malliah* 1959 AIR AP 477: *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149 at p 167, per Lord Evershed MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence'.

[67] The Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2014] 1 MLJ 317 had the occasion to consider the application to disqualify a prosecutor save that the facts of that case failed to meet the threshold required. The Federal Court held that:

> Thus, the issue that he may be a potential witness at the trial that could give rise to a conflict of interest is a non issue. Secondly, whether a case of conflict of interest in a given case is made out would depend on the facts of each case, On the facts and circumstances of this case, we are of the view that no case had been made out to prevent Tan Sri Shafee from acting as a deputy public prosecutor in the appeal on the ground of conflict of interest. We see no reason to nullify the appointment of Tan Sri Shafee as the deputy public prosecutor to represent the public prosecutor in this proceeding.

In that case, similarly with the current case, the question of whether Tan Sri Muhammad Shafee had been duly appointed as public prosecutor was not the issue before the court. The issue before the court was the validity of the appointment as DPP.

[68] From the authorities cited, it is not in dispute that the High Court is vested with the inherent jurisdiction to regulate its proceedings and this includes disqualifying a party from appearing for a litigant for good reason.

Whether the material placed before the court is good enough reasons to disqualify GSR from continuing as SPP and/or to appear on behalf of the public prosecutor in the cases

[69] Parties relied on the test used as enunciated in *Kallininicos v Hunt* [2005] NSWSC 1181 which held that:

> The test to be applied in this inherent jurisdiction is whether a fair minded, reasonably *informed* member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice including the appearance of justice.

The word 'informed' connotes that there must be some material/facts before the public for the public to conclude that a practitioner should be excluded from acting in a given case.

[70] The contention of the applicant is that GSR ought to be disqualified because he is in a position of conflict of interest because:

(a) GSR was involved in investigations in the cases that he is to prosecute; and

(b) GSR has already taken a position on the culpability of the appellant.

GSR involved in investigations

[71] The basis of these allegations arose from the media release given by the AG on 31 August 2018 which states as follows:

> Datuk Seri Gopal Sri Ram, a retired Federal Court Judge, has returned to active practice. He has substantial experience in criminal matters. His strong and determined personality will no doubt enhance the investigation and prosecution in all matters pertaining to the 1MDB scandal.

[72] Subsequently, the AG gave an interview to *The Edge* and *Malaysiakini* on 13 September 2018 where he said:

(a) 'Like for example. Now you know, it's not a secret: the Shafee prosecution. The MACC team interviewed the witnesses. Sri Ram was involved in the final stages of investigations; and

(b) Sri Ram is to push 1MDB and perhaps argue in court for two of those cases. Sri Ram will handle the prosecution of Shafee and probably the first of the 1MDB cases'.

[73] We do not see how the above statement can amount to GSR being involved in the investigations of the cases that he is to prosecute. Investigative powers are vested with the relevant agencies, eg the police (PDRM) for offences under the Penal Code, the MACC for offences under the MACC Act 2009 and the Securities Commission for offences under the Securities Commission Malaysia Act 1993. However, when the investigation process are completed, the IPs will be submitted to the DPPs to charge if there is sufficient evidence to formulate a charge. There has been occasion that the DPPs will instruct the investigation officer to do further minor investigations, usually to clarify matters. But that does not amount to the DPPs getting involved in the investigation on the ground or investigating the case itself. This role is only to ensure that the investigation is carried out in a fair manner and without fear and favor and to ensure that any criminal proceeding is only to be instituted against any person where investigation into the offences has been completed, but never to usurp the powers of the investigating agency.

[74] Apart from the bare assertion by the appellant, there is no material placed before the court to show that GSR was involved in the investigations. GSR had denied the allegations by way of affidavit and he denied categorically that he had any hand in directing or supervising the investigating process. He stated that he has never at any time exceeded his role as a prosecutor.

[75] There is no cogent facts to suggest that GSR was in any way involved in the recording of witness statements from the witnesses or the appellant. In fact the learned judge found that the reinvestigation process into the 1MDB cases

started after the previous AG decided to close the investigations and it started post 14th General Elections in May 2018. GSR was only appointed on 31 August 2018.

[76] The interview and the press release by the AG are testimony as to this, ie that GSR, like any other DPPs are entitled to supervise and oversee any investigation to a particular case, but not to investigate the case himself. Hence the words in the interview 'Sri Ram was involved in the final stages of investigations'.

[77] Therefore, in the absence of any material facts to support the contention that GSR was involved in the investigations, such contention against the appellant is unsubstantiated.

GSR has already taken a position on the culpability of the appellant

[78] This position taken by the appellant is premised on the following:

(a) GSR acted as lead counsel for Dato' Seri Anwar Ibrahim in appeals before the COA in the second sodomy case. One of their defences raised was that the entire prosecution of Dato' Seri Anwar Ibrahim was politically motivated and it was a political conspiracy. In support of these allegations, reference was made to alleged meetings between the complainant and Dato' Sri Mohd Najib and submitted that the complaints against Dato' Seri Anwar Ibrahim was concocted after these meetings;

(b) GSR acted for Dato' Seri Anwar Ibrahim in the Court of Appeal case of W-01(A)-413 of 2017 which is a civil appeal brought against the Government of Malaysia. The issue in this appeal is the allegation that Dato' Sri Mohd Najib had paid Tan Sri Shafee RM9.5m to prosecute the appeals in the second sodomy case. Consequent to this, Dato' Seri Anwar Ibrahim sought for a declaration that his convictions were ultra vires art 5 of the Federal Constitution and were void, invalid and ineffective; and

(c) in 2017, GSR acted for Zaid Ibrahim in a motion for leave in to the Federal Court in relation to the application for a judicial review of the decision of the AG in not prosecuting Dato' Sri Mohd Najib. The press reported that during the course of the hearing, GSR argued that the threshold for leave for judicial review had been met and there was in fact a prior charge sheet drawn up against the appellant herein.

[79] Based on the aforesaid, the appellant submitted that GSR had taken the position on the culpability of the appellant and hence GSR could not possibly have an objective perception in conducting to prosecute the cases against the appellant.

[80] Counsel for the appellant referred to *Grimwade v Meagher*, and submitted that the test to be applied is whether a fair minded and informed observer would apprehend a real risk that the prosecutor would, albeit unintentionally, lack the objectivity and detachment that is required of him in order to perform his duty to his client (in this case, the government) and to the court. There may be a real risk that he failed to distinguish between his personal interests and his duty to his client, in this case to the government.

[81] The learned High Court judge held that the argument of the appellant failed to take note of the cab-rank rule, ie a client cannot be restricted as to whom he chooses to appoint. A necessary corollary of that is of course the concomitant obligation of counsel to accept whatever briefs that come his way subject to certain recognised exceptions.

[82] We view the cab rank rule is only applicable in a solicitor and client relationship but inapplicable in a situation which deals with an appointment of a public prosecutor by the public prosecutor under s 376(3) of the CPC. The same cannot be said that the public prosecutor appointed under s 376(3) has no choice but to accept the appointment.

[83] On the alleged incompatible duties that GSR had undertaken before he took up the appointment as SPP that may give rise to a conflict of interest for GSR to act as counsel in the civil appeal case of Dato' Seri Anwar Ibrahim and this criminal case on behalf of the public prosecutor against the appellant, we are of the view that the fact that GSR had acted in the capacity as aforesaid, would not affect his professional objectivity in conducting the prosecution against the accused. The civil and criminal cases did not involve GSR as a witness nor a person having interest in the outcome of the two cases. The independence and objectivity of GSR as SPP in the present case against the appellant and the role played by GSR as counsel for Dato' Seri Anwar Ibrahim in the civil matter does not lead to incompatible or irreconcilable duties.

[84] Whether the prosecution's aim is to secure a conviction or whether the defence's aim is to obtain an acquittal, one must not lose sight of the ultimate duty of DPPs and defence counsel as officers of the court, which is to adduce the truth in disclosing evidence which would assist the court in determining a fair trial of the accused persons.

[85] In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2014] 3

MLJ 882, it was reiterated by this court that an application to disqualify a counsel ought not to be considered in light of the principle that courts should not lightly interrupt the relationship between a lawyer and a client. A disqualification may be ordered only if the court determines that a lawyer's continued participation as counsel taints the judicial system. On the issue of conflict of interest, this court in *Dato' Seri Anwar bin Ibrahim v Pendakwa Raya* [2014] MLJU 1876 at para 16 had this to say:

> On the issue of conflict of interest, learned counsel for the applicant vehemently argued that it is untenable for Shafee to stand before this court to defend the credibility of SP25 after having made a finding into the Suhakam Inquiry that SP25 either consciously were not telling the truth or suffered from a serious bout of loss of memory? With respect we wish to refer to our judgment in respect of the applicant's motion for leave to recall SP25 ... which we had dismissed on the ground that the finding of the Suhakam Inquiry bears no relevance to this appeal ...

[86] The Federal Court had the occasion to review its earlier decision which confirmed the conviction and sentence on the sodomy charge in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2017] 1 MLJ 273 where the Federal Court said in its judgment with regards to the conduct of Tan Sri Shafee as a DPP, at p 296 paras A-B:

> The Federal Court in their decision found that Tan Sri Muhammad Shafee Abdullah as the lead Prosecutor was a fit and proper person under s 376(3) of the CPC as no evidence was tendered by the applicant to prove that there was such a conflict of interest as alleged by the applicant (see the case of *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2016] 3 MLJ 277 at p 290).

[87] The appellant did not specify whether GSR had breached any of the provisions of the Legal Profession Act 1976 nor has it been shown that GSR had acted contrary to r 10(a) and (b) of the Legal Profession (Practice and Etiquette) Rules 1978.

[88] Premised on the decision and the principle enunciated in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2017] 1 MLJ 273 above, the role played by GSR in the present case and Tan Sri Muhammad Shafee in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2017] 1 MLJ 273 is similar and yet the court found it fit to declare that Tan Sri Muhammad Shafee was a fit and proper person to be appointed as SPP (also refer to *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2014] MLJU 1876; [2014] 4 MLRA 420 at p 421 para (5)).

[89] It must also be borne in mind that, ultimately it is the duty and obligation of the trial judge to take control of its own proceedings. It is the trier of fact who will ultimately decide the fate of the accused person, in this case the appellant.

[90] The appellant submitted that the extent of the prosecutorial discretion can affect the fair trial of the appellant as follows: A

(a) by extension of the public prosecutor's powers under art 145 of the Federal Constitution, prosecutors have the power to institute, conduct and discontinue prosecutions. This is a discretionary power, by and large insulated from the check and balance of judicial review; B

(b) it is for the prosecutor to decide what evidence to disclose to the defence in accordance with s 51A of the Criminal Procedure Code. The prosecutor faces no real obstacle in further admitting 'surprise' documents as trial progresses, by virtue of s 51A(3); C

(c) the prosecutor is not legally obliged to disclose documents which are favourable to the accused. This is entirely a matter of the prosecutor's discretion; and

(d) the prosecutor is similarly protected from the disclosure of statements which are exculpatory to the accused; and D

(e) the prosecutor is also free to pick and choose which witnesses they choose to call, so long as they are able to meet the bare requirement of unfolding the prosecution's narrative. This is also entirely a matter of the prosecutor's discretion. E

[91] We are of the view that the concern of the appellant as aforesaid is at best, a mere speculation and conjecture devoid of any substantive basis given the availability of s 51A of the CPC that the prosecution has a duty to furnish documents to the appellant provided certain conditions are met with. F

[92] There is also the concern by the appellant that the prosecution may suppress or withhold documents and only adduce it in the course of the trial. If that happens, the court can either refuse to accept the document or that the defence be given the opportunity to examine and recall witnesses, if need be, to address any new issue that may arise out of the production of the new document that was not earlier produced or tendered. Suppression of evidence by the prosecution is normally viewed as a serious matter by the court and s 114(g) of the Evidence Act 1950 will take care of that, if it ever arises. Such suppression is fatal to the prosecution's case in any event. G H

[93] Thus, the concerns of the appellant as aforesaid, if any, is not without recourse and there are in built safeguards in the CPC in addition to the court's inherent power in having the control of the conduct of the proceedings so as to ensure a fair trial for the appellant. I

[94] Section 376(3) of the CPC provides that the appointed DPPs shall be under the general control and direction of the public prosecutor. It is not that

A the SPP has a complete untrammeled power to prosecute in any manner he deems fit.

GSR is biased and impartial

B **[95]** This conclusion is based on GSR arguing before the court in opposing an application for bail by the appellant, where GSR submitted as follows:

> Conduct of the accused described by the Attorney General of the United States as the worst case of kleptocracy in the world. In simple language, this is a case of theft
C of unparalleled proportions. And the fact that the elected head of state is facing charges for that crime is a matter of national disgrace. It has made Malaysia famous for all the wrong reasons. I have been informed by the present Deputy Chief Commissioner of Head of the MACC that in 2017, the accused interfered with the investigation of this very case.
>
D ...
>
> What we are saying is there is material in our collection that shows that the accused has the propensity to interfere with on-going investigations.

E **[96]** The appellant also submitted that in opposing the bail application, GSR had suggested a bail condition which is unprecedented as follows:

> The point we want to make is we want a condition imposed that the accused is prohibited from issuing public statements relating to the 1MDB or associated in support of the request we make the application we make to the Court. We refer to
F the case of Datuk Balwant Singh, where Justice Augustine Paul, ... the Accused is not to be present in any open public space, or to attend any public functions, save for religious and family activities'. We ask for the same condition to be imposed on the accused. That is all ...
>
G It is a matter of notoriety that the accused Najib interfered with investigations against him by removing the then Attorney General, Tan Sri Abdul Gani Patail and several members of the MACC and in directing the arrest of a Deputy Public Prosecutor with the MACC. As a Senior Deputy Public Prosecutor, it was my duty to draw the court's attention that to the fact that the accused Najib had interfered with investigations against him as this is relevant consideration in the grant or
H refusal of bail.

[97] We take note that those arguments or submissions by GSR was in opposing the bail application of the appellant in the course of bail argument. It is the duty of the prosecution to object to bail and provide reasons in support
I for such objection. Similarly, if the court is minded to grant bail it is always the norm for DPPs to suggest conditions attached in granting bail. Such arguments in objecting to the bail application and suggesting the conditions if bail is granted (although the bail conditions as argued by GSR were unprecedented) are not something that is against the law. Ultimately it is for the judge hearing

the bail application to decide whether to grant bail or with conditions attached. This can be seen in the decision of the judge who granted bail to the appellant.

[98] In any event, however overzealous the argument from GSR may seemed to be in objecting to the bail, GSR did not object when the bail money was to be paid by installments.

[99] The case of *MG v R* [2007] NSWCCA referred to, can be distinguished from its facts. There the prosecutor had prior to the appointment made a public statement saying inter alia, 'I commend the quality of the police investigation and fortitude of the victim'. It was held by the Supreme Court that it was inappropriate for the prosecutor to continue acting as prosecutor in the case. The Supreme Court held that the prosecutor's public expression of that view displayed partiality and potentially compromised her capacity to fairly prosecute on behalf of the crown. 'The statement had the consequence that a fair minded person might reasonably conclude that her conduct of the prosecution would be directed to vindicating her publicly expressed view. When a prosecutor on a public occasion expresses the view that a person is guilty, although they have not been tried according to law, the later prosecution of that person by that prosecutor tends toward oppression which is the antithesis of a fair trial'. It is obvious that the prosecutor in this case made a public statement outside court. Compare this to GSR who was arguing in his capacity as a public prosecutor opposing the bail application. He cannot be penalised for making his submissions in court proceedings. This statement was not made to the media as in *MG v R*.

[100] Therefore based on the aforesaid, we are of the view that the learned judge did not err when he found that the apprehension of overzealous prosecution on the part of the appellant was based upon mere speculation as opposed to actual prosecutorial misconduct.

[101] There is nothing before the court to show that there is a real danger of bias by GSR if he continues to act as prosecutor in this case. What constitutes biasness has been explained by the Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 at p 324 where the court laid down the test to determine the danger of biasness:

> In England, the courts applied the real danger of bias test in a criminal case. In *R v Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicious test. Lord Goff, after examining the authorities in detail, reformulated the real danger test as follows (at p 679): [Having] ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favor, or disfavor, the case of a party to the issue under consideration?

[102] Applying the principles as enunciated in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara,* after having regard to the facts, what is alleged are mere general suspicions and not based on specific facts. To disqualify a prosecutor, the burden is on the appellant as the applicant, to show cogent evidence and with certainty of such biasness and not mere bare allegations. This court in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2014] 3 MLJ 882 at p 887 emphasised the fact that the allegations of unethical conduct of a counsel must be specific and precise. There must be a positive violation of one or more rules of etiquette. Further it was also held by this court that the courts should be slow in making an order of disqualification unless absolutely necessary and for good reasons. The Federal Court in *Maleb bin Su v Public Prosecutor* [1984] 1 MLJ 311; [1984] 1 CLJ Rep 232 also held that if bias is alleged, there must be proved a real likelihood of bias and that reasonable suspicion or bare allegations are insufficient.

Whether GSR ought to be disqualified from continuing to act as SPP and/or to appear on behalf of the public prosecutor in the cases against the appellant

[103] There is also the concern that the non-production of the LOA of GSR will violate the appellant's constitutional right to a fair trial under arts 5 and 8 of the Federal Constitution.

[104] We take the view that this is highly unlikely as the trial will be governed with the adjectival law and the learned High Court judge presiding over the case will ensure that there would be strict compliance with the relevant procedure in regards to criminal procedure and evidence. In this regard a similar application was made in the case of *Datuk Seri Anwar bin Ibrahim v Public Prosecutor* [2014] 3 MLJ 882 where this court had refused the application to disqualify Tan Sri Muhammad Shafee's appointment as public prosecutor premised on the allegation that his appointment is in breach of arts 5 and 8 of the Federal Constitution. The Court of Appeal held that the appointment of Tan Sri Shafee did not at all deprive the appellant of a fair trial. This is what the Court of Appeal said in the judgment:

> [18] The applicant contends that the appointment of Shafee is in breach of arts 5 and 8 of the Federal Constitution. With respect, we are unable to agree. We are unable to appreciate how the appointment of Shafee will deprive the applicant of a fair trial because the prosecution of the appeal by Shafee will undoubtedly rest solely on the appeal records prepared by the court. There is no possibility that any evidence favourable to the applicant will be concealed or withheld from the court. Further, it is pertinent to note that Shafee is not the sole public prosecutor appearing for the public prosecutor in the appeal. On record, there are with Shafee two Senior DPPs from the Attorney General's Chambers ... who were part of the prosecution team in the court below.

[105] It is also to be noted that the final outcome of the case lies with the presiding judge who is impartial and who will hear and examine the evidence adduced before coming to a decision.

[106] As far as the appellant is concerned he will be defended by a team of capable and experienced counsel of his choice throughout the duration of the trial.

[107] Given the aforesaid, how can it be said that the appellant will be deprived of his constitutional rights of having a fair trial by the mere non production of the LOA of GSR.

The alleged perjury committed by GSR

[108] The appellant submitted in the court below that GSR is not a fit and proper person to act as public prosecutor because he was shown to have previously given false testimony in a trial before the Kuala Lumpur High Court.

[109] In the said KL High Court Suit S1-022–1311 of 2005, in the reply and defence filed by GSR in that suit, GSR alleged that RM700,000 that was paid to him after his elevation to the Court of Appeal by his former firm, Messrs Sri Ram & Co, constituted fees that was payable to him directly pursuant to an arrangement with a client, Ramamurthi. Ramamurthi, according to GSR was a client of his since 1970s and the fees was said to be fees for past services GSR had rendered to Ramamurthi over the years.

[110] The defendants, through a request for further and better particulars, sought GSR's confirmation on whether GSR had paid income tax on the amount of RM700,000 he received.

[111] In GSR's further and better particulars, GSR took the position that he had paid income tax on the amount of RM700,000.

[112] During the trial on 20 July 2009, in answer to questions put to him in cross-examination, GSR took the position that he did pay income tax on the RM700,000 received. However, when asked to produce his tax filings for the material period, GSR initially said he was unable to find these documents. GSR then took the position that he was unprepared to give consent to the officers of Inland Revenue Department, who were present in court, to produce these documents.

[113] The appellant submitted that GSR *was believed* to have perjured. GSR

never disclosed the amount of RM700,000 as income received during the material period to the Inland Revenue Department and did not pay income tax on this amount.

[114] The appellant had challenged GSR to produce his tax filings for the material period commencing from the date he received the payment of the said RM700,000 up to 2010 (the time when he gave evidence to refute this in court).

[115] GSR refused production thereof. Hence the appellant submitted that an adverse inference ought to be drawn against GSR on his failure to produce the rebuttal evidence.

[116] We are of the view that, whatever that had happened, it has been never shown that GSR had been found to be guilty of perjury or any misconduct by any forum. In *Dato' Seri Anwar bin Ibrahim v Pendakwa Raya* [2014] MLJU 1876, Tan Sri Muhammad Shafee has been found to have breached the Legal Profession Publicity Rules 2001 and that his appeal to the High Court was dismissed. Counsel for the applicant submitted that since Tan Sri Muhammad Shafee has been found guilty of misconduct under s 94(3)(k) of the Legal Profession Act 1976, this made him liable to be struck off the Rolls under s 94(2) of the same. Therefore Tan Sri Muhammad Shafee is not a fit and proper person to be appointed as a DPP. Counsel for the applicant urged the court to exercise its inherent jurisdiction to disqualify Tan Sri Muhammad Shafee from prosecuting the appeal. There this court has held that the fact that the Bar Disciplinary Committee has deemed it fit not to strike out Tan Sri Muhammad Shafee off the Rolls, showed that Tan Sri Shafee is a fit and proper person to act as a DPP. What more in the case of GSR, there has never been any finding of guilt or offence committed, how could his case be any worst than Tan Sri Muhammad Shafee's situation.

[117] We therefore found that the learned High Court judge did not err when he held that the allegations of perjury are mere allegations unsupported by any evidence or material as they have not been proven in any court of law.

CONCLUSION

[118] Given the aforesaid, we are of the view that the learned High Court judge did not err in fact or law when he dismissed the notice of motion and found that GSR is a fit and proper person to be appointed as SDPP.

[119] We therefore dismissed the appeal by the appellant. The decision of the learned High Court judge is therefore affirmed.

Appeal dismissed.

Reported by Ashok Kumar